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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*,

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	8
Background	8
Proceedings Before the Commission	9
Proceedings on Review	11
The Court's Opinion	12
The Court's Order on Rehearing	13
REASONS FOR GRANTING THE WRIT	14
CONCLUSION: REQUEST FOR SUMMARY REVERSAL	21
APPENDIX: Excerpt from *Williams v. W.M.A.T.C.*, 415 F.2d 922 (D.C. Cir. 1968)	A.1

TABLE OF AUTHORITIES

Cases:

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) . . . 16

F.P.C. v. Tennessee Gas Co., 371 U.S. 145 (1962) . . . 18

F.T.C. v. Eastman Kodak Co., 274 U.S. 619 (1927) . . . 17

F.T.C. v. Raladam Co., 283 U.S. 643 (1931) . . . 17

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) . . . 17

Moss v. C.A.B., D.C. Cir. No. 23627 (July 9, 1970), 39 U.S.L. Week 2045 . . . 18

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) . . . 9, 12, 16, 20, 21

Permian Basin Area Rate Proceeding, Op. 468, 34 FPC 159 (1965) . . . 9, 10, 20, 21

Page

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 8

Phillips Petroleum Co., Op. 338, 24 FPC 537 (1960) 8

Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922 (D.C. Cir. 1968), cert. denied, 393 U.S. 1081 . . . . . 12, 20, 21

Wisconsin v. F.P.C., 373 U.S. 294 (1963) 8

Statutes:

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w 14, 15

Section 4, 52 Stat. 822, 15 U.S.C. § 717c 3, 4, 5

Section 5, 52 Stat. 823, 15 U.S.C. § 717d 3, 5, 6

Section 16, 52 Stat. 830, 15 U.S.C. § 717o 6, 13

Section 19, 52 Stat. 831, 15 U.S.C. § 717r 2, 6, 7, 8, 10, 13, 16, 17

Other:

F.P.C., Termination of Moratorium in Southern Louisiana, Docket No. R-394, Notice of Proposed Rulemaking (July 30, 1970) 20

Senate Judiciary Subcommittee on Antitrust and Monopoly, Hearing of March 3, 1970 19

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The Public Service Commission of the State of New York prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered March 19, 1970, in Fifth Circuit No. 27492, *et al.*

OPINIONS BELOW

The opinion and the order on rehearing of the court of appeals are not yet reported. The opinions and orders of the Federal Power Commission (Opinion Nos. 546 and 546A) are reported at 40 FPC 530 and 41 FPC 301.

Copies of the court of appeals' opinions have been filed as an appendix to the petition for a writ of certiorari in No. 669, this Term, *Municipal Distributor Group v. Federal Power Commission et al.* Said appendix is hereinafter cited as "MDG App. ___."

JURISDICTION

The judgment of the court of appeals affirming the Commission's order was entered on March 19, 1970 (MDG App. E), and the order on rehearing was entered on June 16, 1970 (MDG App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED[1]

1. Whether, under Section 19 of the Natural Gas Act, a court of appeals may, after sustaining in full a Federal Power Commission area rate order directing gas producers to reduce their rates to the just and reasonable level and to refund past overcharges, nonetheless empower the Commission to excuse the refunds and to authorize, retroactively as well as prospectively, rates higher than those prescribed by the order being affirmed.

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[1] Although petitioner believes that both issues presented by this petition warrant review by this Court, it appears that the public interest would best be served if the refunds and rate reductions called for by the Federal Power Commission were made effective as promptly as possible, and this can be achieved if the Court were to grant certiorari and summarily reverse on the first issue. Accordingly, as set forth in the Conclusion, *infra*, pp. 21-22, we respectfully request that the Court follow this procedure. If, however, the Court determines to grant certiorari and to receive briefs and argument on the merits, then we would ask that the writ encompass both issues presented by this petition.

2. Whether, under Sections 4 and 5 of the Natural Gas Act, the Federal Power Commission may prescribe rates that include a series of arbitrary bonuses or cushions whose effect is to boost the rate of return above the maximum level found permissible by the Commission.

STATUTE INVOLVED

The Natural Gas Act, June 1, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w provides in pertinent part:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any

manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspen-

sion period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing

rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

* * * * *

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have

been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

STATEMENT OF THE CASE

This petition brings before the Court the Federal Power Commission's September 1968 area rate determination for the Southern Louisiana production area and the Fifth Circuit's orders of March 19 and June 16, 1970, in which the court found the Commission's orders to be without legal error and sustained those orders in full, but nonetheless empowered the Commission to rescind both the refunds of past overcharges and the reductions to the just and reasonable levels required by the affirmed orders.

Background

In 1954, this Court, reversing the Federal Power Commission, held that under the Natural Gas Act the Commission had, and was obligated to exercise, jurisdiction over the prices at which producers sold natural gas in interstate commerce, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672. Following the 1954 decision, the Commission instituted a series of rate investigations against each of the major producers; but when the first such investigation came before it for decision, the Commission concluded that it would be preferable to fix producer rates on an industry-wide basis, by producing area, and it terminated the individual company investigations, *Phillips Petroleum Co.*, Op. 338, 24 FPC 537 (1960), aff'd, *Wisconsin v. F.P.C.*, 373 U.S. 294 (1963).

Shortly after announcing its determination to proceed on an area rate basis, the Commission instituted two area rate proceedings: AR61-1, instituted in December 1960, involv-

ing the Permian Basin, and AR61-2; the instant proceeding, instituted in May 1961, involving Southern Louisiana. Permian, accounting for a substantially smaller portion of the nation's gas supply than Southern Louisiana—approximately 10% as against 35%—proceeded somewhat more rapidly than Southern Louisiana, with the Commission's *Permian* opinion being issued in August 1965, Op. 468, 34 FPC 159, and being sustained in full by this Court in May 1968, *Permian Basin Area Rate Cases*, 390 U.S. 747.

Proceedings Before the Commission

Following a series of prehearing conferences in the Southern Louisiana proceeding, the prepared testimony of all parties was placed in evidence in December 1963 and March 1964. The formal hearings commenced in April 1964 and remained in almost continuous session for eighteen months, concluding on November 5, 1965 (some three months after the Commission's *Permian* opinion). Consumer motions to omit the examiner's decision were denied by the Commission, 34 FPC 1332. A little over a year later, on December 30, 1966, the examiner issued his initial decision, 40 FPC 703. With certain limited exceptions, not here material, the examiner's decision followed, both in approach and result, the Commission's *Permian* opinion. The examiner found costs (including a 12% return) ranging from 15.88¢ to 18.53¢ per Mcf, and recommended ceiling rates ranging from 16.75¢ to 19.5¢.

Exceptions to the examiner's decision were filed; and again consumer efforts to expedite Commission decision proved unavailing, for it was not until September 25, 1968—almost three years after conclusion of hearings and some twenty-one months after the examiner's decision—that the Commission issued its final opinion in this proceeding. In the meantime, of course, this Court had affirmed *Permian*, and the Commission's opinion, which was unanimous, followed closely the approach taken in *Permian*, with two major exceptions: (1) Whereas in *Permian* the Commission

had based rates directly on the costs it had determined (including return on investment), in *Southern Louisiana* it added a series of bonuses or cushions to each category of costs to derive rates up to 2¢ per Mcf above the cost determination; (2) whereas in *Permian* the Commission had imposed a moratorium on rate increase filings for two-and-one-half years, in *Southern Louisiana* the Commission concluded that the rates that it had fixed should remain in effect until changed by further Commission order.

The ceilings imposed by the Commission ranged from 17¢ to 20¢ per Mcf, depending on date of contract and location of production, and as part of its order the Commission directed (1) that the producers reduce all rates in excess of the ceilings to the ceiling levels, and (2) that to the extent producers had in the past collected amounts in excess of the applicable ceiling and such amounts had been collected subject to refund, refunds of past overcharges should be made, together with the appropriate interest. As of the date of the Commission's order, the effective rates exceeded the just and reasonable levels, as determined by the Commission, by some $70,000,000 per year, and the refunds due under the order, covering excessive collections dating back to the 1950's, approximated $150,000,000.

Applications for rehearing—a prerequisite under Section 19 of the Natural Gas Act to judicial review—were filed by both producer and consumer interests, and the producers also requested that the refund and rate reduction provisions be stayed. The Commission deferred action on the applications for rehearing (thereby forestalling court review), but granted stays sought by the producers pending disposition of the rehearing applications. Finally, on March 20, 1969—almost six months after the filing of the first application for rehearing—the Commission entered its order, substantially reaffirming its original opinion, Op. 546A, 41 FPC 301. As part of its order on rehearing, the Commission rejected the producer contentions that the rate reduction and refund provisions should be stayed pending the anticipated judicial review. The Commission stated (41 FPC at 338):

". . . [G]rant of stay would mean the continued collection of rates which we have found, after careful consideration, to be excessive. . . .

"To compel rate payers to continue to pay excessive rates and charges is contrary to the primary aim of the Natural Gas Act to protect consumers. The issuance of a stay in these proceedings would defer for an extended period rate reductions which are already long overdue."

Proceedings on Review

Within a matter of seconds of the Commission's issuance of its order denying rehearing, a petition for review was filed in the Fifth Circuit on behalf of Austral Oil Company—a smaller producer which did not thereafter participate actively in the appeal—and Austral's petition was deemed first-filed for the purpose of fixing venue for all subsequent appeals taken, both by other producers and by two consumer representatives, the Public Service Commission of the State of New York and the Municipal Distributor Group. The producers immediately sought to stay the Commission's order pending appeal, and their motions were opposed by the consumer interests and the Commission. The court initially resolved this conflict by providing for an accelerated briefing schedule under which argument on the merits would be held in June 1969, and granted a stay until that date. At the request of the producers, however, the court granted an extension of time for briefing, deferred oral argument until October 1969, and directed the Commission to stay its order until that time. Following submission on the merits, the panel which heard argument (Judges Brown, Jones, and Carswell) (1) extended the stay, and (2) advised counsel that two members of the panel held stock in the oil company petitioners and invited comments. Before comments could be filed, the panel entered a second order assigning the case to another panel (but taking no action on the order extending stay), and a second oral argument, before a different panel, was held in December 1969.

The Court's Opinion

On March 19, 1970, the court below entered its opinion and judgment sustaining in full the Commission's order. The court first rejected the consumer contentions that costs were overstated and that the 12% rate of return allowed by the Commission was not adequately justified. Turning to the various cushions, the court distinguished the D.C. Circuit's disallowance of cushions in *Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922 (1968) (en banc), cert. denied, 393 U.S. 1081, on the ground that "the gas industry is different from metropolitan transit" (MDG App. A 27 n. 46). The court also felt that there had been adequate reasons for the Commission's allowance of these increments—viz. the unavailability of reliable offshore cost data, and the need to protect producers against the possibility of cost increases during the moratorium period—though it agreed that the Commission had not articulated its findings on this score.

Relying primarily on this Court's *Permian* decision, the court of appeals also rejected the various producer contentions that the Commission's rate ceilings were unlawfully low and the moratorium period was unlawfully long.[2] While indicating its concern with extra-record claims that a gas supply shortage had arisen subsequent to the Commission's order, the court noted that it did not know "whether the information that has reached us is correct or not" and that in any event it could not "evaluate the supply situation" (MDG App. A 58). The court went on to suggest that, although the Commission's order was being "sustained in full" (MDG App. A 2), the Commission itself would have power to modify or set aside that order if it believed that circumstances warranted such changes (MDG App. A 59, 69).

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[2] The court also denied, sub silentio, the various producer motions for leave to adduce additional evidence purportedly showing a shortage of adequate gas supplies.

The court's language indicates that it believed this power was found in Section 16 of the Natural Gas Act and could be exercised retrospectively as well as prospectively (MDG App. A 70 n. 124).

Petitions for rehearing were filed by the producers, pointing out that while the Commission would, on affirmance, retain the right to change rates prospectively, affirmance of the order would cut off the Commission's power to rescind either the refunds (relating to the period prior to October 1, 1968, the effective date of the Commission's order) or the excess collections accumulated by the producers under the court's stay (collections subsequent to October 1, 1968 to the date that the Commission might enter a new order increasing rate ceilings above the Opinion 546 levels). Pursuant to the court's request, responses directed to this point were filed by the consumer interests and the Commission; the responses agreed with the producers' legal position that, following affirmance, the Commission's order would become final and the Commission would have no power under the statute to go back and readjust either the refund or rate reduction requirements. The Commission's response, in addition, went on to note that there was no precedent governing the extent of a reviewing court's equitable powers, under the review provisions of the Act, to alter this legal consequence, and concluded with a terse request for remand, which, the response indicated, had been adopted by a 3-2 vote of the Commission.

The Court's Order on Rehearing

On June 16, 1970, the court entered a three-page order on rehearing (MDG App. B). While emphasizing "our judgment is an affirmance and not a remand," the court concluded that it had "broad remedial powers" under Section 19(b) of the Natural Gas Act and that as "part of the remedy in this case" it was giving the Commission authority "to reopen *any* part of its order that circumstances require,"

adding that under such authority "the Commission can make retrospective as well as prospective adjustments." Like the Commission response on which it was based, however, the court's order on rehearing cited no precedent and provided no legal analysis for its conclusion that it could grant a remedy in the absence of injury, or that, upon affirmance in full, any "remedy" was called for.

Although the court had, in its original opinion of March 19, 1970, announced that it would dissolve the stay, it postponed dissolution pending action on the petitions for rehearing. Following issuance of the order on rehearing, the court again announced its intent to dissolve the stay. On July 2, 1970, purportedly pursuant to the court of appeals' opinion on rehearing, the producers asked the Commission to extend the stay; on the same day and without awaiting responses, the Commission granted an indefinite stay. Rehearing of the stay order was timely sought by the Public Service Commission of New York, but was denied on August 26, 1970.

REASONS FOR GRANTING THE WRIT

The issues raised by this petition are crucial not only in the administration of the Natural Gas Act and, by extension, in the administration of other federal regulatory statutes having cognate provisions but, even more important, in defining the proper scope and function of judicial review of agency action. In granting a remedy where it had found no injury to exist, and thereby destroying the operative provisions of a Commission order as to which it found no error, the decision below so far departed from the usual and accepted course of judicial procedure as to call for an exercise of this Court's supervisory power. Moreover, in affirming Commission-fixed rates based on the inclusion of arbitrary bonuses, the decision below was in conflict with a recent, unanimous *en banc* determination of the Court of Appeals for the District of Columbia Circuit; this conflict, which is likely to be a recurring one, should be resolved by this Court.

I.

The action of the court of appeals in holding, on rehearing, that although the Commission's order was found to be without legal error and was therefore "sustained in full," the Commission should, "as part of the remedy in this case," be given authority to reopen any part of that order is without authority or precedent, flagrantly disregards the consumer interest the Natural Gas Act was designed to protect, and can only be disruptive of orderly administrative procedures.

The principal and immediate effect of the court of appeals' novel "remedy" is to place in a state of uncertainty precisely that which this entire proceeding, now in its tenth year, was designed to make certain—the lawful rates for sales from the Southern Louisiana area, which, under the statute, are to be made effective through the refunding of past overcharges collected subject to refund and the reduction of present rates to the just and reasonable level.

For many years prior to the Commission's determination, the producers had filed for and, pending the outcome of the Southern Louisiana proceeding, been permitted to collect increased rates subject to refund of any amounts subsequently determined to be excessive. In its September 1968 order, the Commission found that these past collections were excessive by an amount subsequently estimated at $150,000,000 and directed refunds of this amount.[3] It further found that the rates effective in September 1968 were excessive by an estimated $70,000,000 annually and directed that these rates be reduced to the just and reasonable levels.

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[3]This figure does not include all past overcharges, but only those overcharges collected subject to refund. Thus, for example, while AR 61-2 was pending the Commission authorized new sales at the "in-line" level; although this level turned out to exceed the just and reasonable level determined in AR61-2, the Commission lacked power to require refund of the excess.

Although the Commission had found that the producer request for a stay of the refund and rate reduction requirements was not warranted and would be injurious to the consumer, the Fifth Circuit, over the opposition of the Commission and the consumer interests, granted the producers a succession of stays, so that no refunds or rate reductions have ever been made; the total amount of refunds now due has been estimated to exceed $375,000,000.[4] It is this amount—representing past overcharges by the producers—whose return to the consumer has been postponed indefinitely and whose ultimate disposition has been rendered uncertain by the court of appeals' "remedy". We turn now to a discussion of the errors which underlie that "remedy":

1. *The court's remedy finds no support in the statute.* Although the court purported to act pursuant to "the broad remedial powers that inhere in a court of equity" under Section 19(b) of the Natural Gas Act, there is assuredly nothing in the language of Section 19(b)—a more-or-less standard review section—that grants broad remedial powers either expressly or impliedly. See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 at 336 (1958). To the contrary, the section gives a court of appeals, on review of an FPC order, the power to do three things—to "affirm, modify, or set aside such order in whole or in part". In addition, where a petitioner moves the court for leave to adduce additional evidence before the Commission, the court may grant such motion.[5] These statutory provisions

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[4] Because the stays were granted for only a few months at a time, there was no effective way to bring the Fifth Circuit's action to this Court, even though it was clear at the time that, in light of this Court's *Permian* decision, the producers' chances of success on the merits were minimal and hence there was no justification for granting the stays.

[5] Shortly after initiation of the review proceedings in the court below, the producers filed motions for leave to adduce additional evidence, and action thereon was deferred until argument on the merits. The motions were ultimately denied sub silentio.

are in keeping with the traditional function of an appellate court—to search the record and decision below to determine whether prejudicial legal error has been committed. If there is no such error, the order is left standing; if error is found, the order is either modified, where that is appropriate, or set aside and the case remanded for such further disposition as may be required to correct the error. And while a reviewing court undoubtedly has broad powers both in fashioning the terms of a remand to correct discovered error and in protecting the integrity of its mandate, it is not accurate to suggest, as did the court below, that the statute grants some broad remedial powers that exist wholly apart from the specific language of Section 19(b). In short, there is nothing in Section 19(b) that even hints that upon finding the order under review to be free from legal error, a court of appeals has any power, remedial, equitable, or otherwise, to modify that order, or limit its operation, or grant the Commission powers it would not otherwise have under the Natural Gas Act. *F.T.C. v. Eastman Kodak Co.*, 274 U.S. 619 at 623-24 (1927); *F.T.C. v. Raladam Co.*, 283 U.S. 643 at 649 (1931); see also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 at 254 (1951).

2. *The court's remedy bears no reasonable relationship to its substantive holding.* While, as suggested above, a court of appeals has discretion to fashion a remedy which will effectuate its substantive holding, it cannot direct a remedy that is unsupported by, and indeed is contrary to, its substantive holding. The remedy granted by the court below might have been appropriate if the court had set aside the Commission's order, in whole or in part, but as the original opinion makes abundantly clear and as the order on rehearing explicitly states, "we emphasize that our judgment is an affirmance and not a remand." The court has thus provided a remedy to the producing industry—at the expense of the consumer—based on a holding that the industry has suffered no injury.

Nor can the court's action be justified as an appropriate disposition of a fund created pursuant to a court-ordered stay. The sole basis for the stay requested by the producers was the irreparable injury they would otherwise suffer if they were required, pending final outcome of the appeal, to make refunds and reductions pursuant to Opinion No. 546 *and* it should subsequently be determined on appeal that Opinion No. 546 was legally defective. Once it is determined that Opinion No. 546 was not legally defective, there is no basis for continuing to withhold the fund created by the stay from the consumer, who, as a result of the stay, was required to pay the excessive charges.

3. *The court's "equitable" remedy totally ignores the equities of the gas-consuming public.* Although this proceeding involves important public issues and arises under a statute whose purpose is to protect consumers against excessive rates and charges, the court of appeals, in purporting to grant a remedy pursuant to its "equitable" powers, gave little if any consideration to the equitable right of consumers to prompt relief from the continued payment of just such charges, *F.P.C. v. Tennessee Gas Co.*, 371 U.S. 145 at 154 (1962). And the fact that the excessive charges have been in effect over an extended period, dating back in some instances to the 1950's, is surely an important factor in any equitable determination to permit still further delay. It is, in any event, extremely difficult to understand how—particularly in the absence of any suggestion that the industry is in dire financial straits[6]—evidence of a possible impending gas shortage today can, in the name of equity, retroactively authorize the admitted overcharge of consumers two, or five, or ten years in the past. Moreover, by declining to grant producer motions for leave to adduce additional evidence, the court below implicitly recognized that the extra-record information of a gas-supply shortage pro-

[6]That even dire financial straits may not be sufficient to justify a rate increase, let alone a forgiveness of past overcharges, see *Moss v. C.A.B.*, D.C. Cir. No. 23627 (July 9, 1970), 39 U.S.L. Week 2045.

vided no basis for relief; part of the reason for that implicit recognition was made explicit by the court's concession (MDG App. A 58) that it did not know "whether the information that has reached us is correct or not."[7] Relief based on such uncertain support can hardly be characterized as "equitable".

4. *The court's remedy is inimical to the administration of justice.* The remedy prescribed by the court below severely diminishes the possibility that any rate reduction order will ever be made effective. An industry faced with a well-supported and obviously valid order directing lower rates can, by taking an appeal of little or no merit in a sympathetic circuit, obtain a stay of the reduction pending appeal, and can await—or worse, help to create[8]—changed circumstances that will provide a basis not for reversal or remand but for a "remedy" that may operate as a remand.

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[7] The virtual impossibility of determining whether a gas shortage is the economic result of FPC-fixed rates or has been contrived by the industry in an effort to defeat government price regulation has been well described by the Honorable George P. Shultz:

> "The [petroleum] industry is capable of behaving irrationally for short periods, and even of contriving an apparent disaster by ceasing exploration [and] dramatically revising its reserve additions downward . . . . [Such industry action could] produce an appearance of crisis calling for immediate 'corrective' action, e.g., . . . higher prices . . . . The industry associations could help to produce such an impression . . . . And we must not forget that the 'facts' for decision will be produced largely by these same firms and associations.
>
> "The industry is not monopolistic enough to sustain a false reaction over an extended period; in the long run the normal commercial motives will reassert themselves and objective facts would win out. But we have no assured means of preventing over-reaction or downright manipulation in the short run, nor is it clear how the administration would distinguish between a fake disaster and a real one." Testimony before Senate Judiciary Subcommittee on Antitrust and Monopoly, March 3, 1970.

[8] See note 7, *supra*.

It is obvious that any procedure that rewards delay and insubstantial appeals will promote delay and insubstantial appeals, and will thereby subvert the administration of justice.

II.

As previously noted, *supra* p. 10, the principal difference between the Commission's order in the Permian Basin Area Rate Proceeding and its order here was that in *Permian* the Commission fixed the area rates "directly from costs of service, without allowance for noncost factors," 390 U.S. at 799, whereas in the present case the Commission, in fixing rates, added arbitrary bonuses or cushions of up to 2.0¢ per Mcf above the applicable costs of service.

Although recognizing that the Commission had failed to provide adequate findings to support these cushions (MDG App. A 29-30, nn. 50, 51, 54), the court below sustained these allowances.[9] The court's decision is thus squarely in conflict with the recent unanimous en banc determination of the District of Columbia Circuit (per Robinson, J.) in *Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922 at 972-75 (1968), cert. denied, 393 U.S. 1081, which held that the allowance of cushions over and above cost and a fair return was arbitrary, and hence reversible, under a regulatory statute mandating just and

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[9]The court of appeals suggested that the cushions could be justified as necessary to protect the producer against the possibility of cost increases during the lengthy moratorium periods (MDG App. A 29). There are two defects in such reasoning. First, the Commission allowed the largest cushion (1.2¢-2.0¢ per Mcf) for the contracts which had the shortest moratorium period, i.e., the third-vintage contracts. Second, although the Southern Louisiana rate-change moratoria called for by Opinion No. 546 have been in effect less than two years, the Commission has already (Notice of Rulemaking issued July 30, 1970, Docket No. R-394) announced its intention to terminate those moratoria; thus, the effective length of the Southern Louisiana moratorium may well be less than the two-and-a-half-year moratorium prescribed in *Permian*, where no cushions were allowed.

reasonable rates. (The relevant portions of the D.C. Circuit's opinion are included as an appendix to this petition.) The Fifth Circuit's attempted distinction (MDG App. A 27 n. 46) between the D. C. Transit System, whose rates were at issue in *Williams*, and the oil industry, whose rates for natural gas are at issue here, is, to say the least, unpersuasive: if a difference in treatment under substantially similar statutory provisions is to be permitted, the facts favor the relatively weak and financially uncertain D.C. Transit, not the enormously strong international oil companies, whose regulated natural gas sales account for less than 5% of total revenues.

Moreover, as the court below correctly recognized in referring to the effect of the cushions on return (MDG App. A 40 n. 72; emphasis added):

> "Noncost factors, if they are viewed as additions to the return—*and this is a logical way to view them, since they must go either to pay costs or to increase return*—would increase return to 14-16 percent for new gas."

But the Commission never purported to justify any return in excess of 12%. Thus, the bonus-inflated rates generate, under the Commission's own standard, a return that is excessive, clearly demonstrating that the bonuses are improper and should be disallowed.

CONCLUSION: REQUEST FOR SUMMARY REVERSAL

For the reasons set forth above, we respectfully request that the petition for certiorari be granted.

In view of the lengthy delays that have characterized this proceeding and that have until now deprived the consumer of the benefits of the Commission's order, and in view of the substantial similarity between this case (except for the matters raised by the second issue presented herein) and the *Permian Basin* case, petitioner respectfully suggests that

the public interest would best be served if the Court were to grant this petition for certiorari on the first issue presented herein, summarily vacate the court of appeals' order on rehearing, and sustain in full the Commission's area rate order.

In the event the Court concludes that this case should be set for plenary consideration, then we would request that the writ of certiorari encompass both issues presented by this petition.

Respectfully submitted,

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September 14, 1970

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,200

RICHARD A. WILLIAMS and ALFRED S. TRASK, *Petitioners*

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *Respondent*

D.C. TRANSIT SYSTEM, INC., *Intervenor*

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* * *

On Petitions to Review Orders of the
Washington Metropolitan Area Transit Commission

Decided October 8, 1968

Before BAZELON, *Chief Judge*, FAHY*, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM and ROBINSON, *Circuit Judges*, sitting *en banc*.

ROBINSON, *Circuit Judge*:

* * *

The "cushion"

We also hold that the Commission has failed to justify its inclusion of "$550,000 to $650,000" as a "cushion" in the margin of return it allowed. The "cushion", the Commission stated, was the amount "required to enable Transit to maintain a sufficient surplus to cover contingencies and

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Circuit Judge Fahy became *Senior Circuit Judge* April 13, 1967.

to assure the financial stability of Transit."[306] The Commission explained the need for the "cushion" as follows:

> "Admittedly, the commission has been conservative in its estimates for future revenues and expenses. In fact, the difference between the net operating income projections of the commission and Transit amounts to more than $800,000. The commission feels that in prescribing rates under the operating ratio method it should be careful not to overestimate revenues or expenses since the rate of return is directly geared to these items. If we, even inadvertently, should include margins of error, in the estimated operating revenues or expenses, we would be allowing a return on such errors. The great possibility of error in estimates and projections, a very real contingency, thus is better given weight here in the margin of return allowed than above the line where the effect would be compounded."[307]

The process of fixing rates prospectively necessarily imposes on a ratemaking authority the difficult task of estimating the utility's cost, in future years, of providing service to the public. Even the most intelligent estimate of future expenses, because it is an estimate, does not dispel completely the possibility of some inaccuracy.[308] Notwithstanding the uncertainty that attends all prophesy, a regulatory agency is duty bound to make its forecasts as accurate as it possibly can, and a reviewing court is entitled

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306 *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 67.

307 *Ibid.*

308 "An intelligent estimate of probable future values. . . . and even indeed of present ones, is at best an approximation. The like is true of a forecast of the extent of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utils. Comm'n*, *supra* note 161, 292 U.S. at 310.

to assume that it has done so.[309] Nevertheless, without reference to any criteria whatsoever, the Commission here concluded that a "cushion" of from $550,000 to $650,000 was needed to offset the supposed unreliability of its estimates.

The Commission stated that "in prescribing rates under the operating ratio method it should be careful not to overestimate revenues or expenses since the rate of return is directly geared to these items. If we, even inadvertently, should include margins of error, in the estimated operating revenues or expenses, we would be allowing a return on such errors."[310] But there is no indication in this case that any undue possibility of error existed. Indeed, the Commission's estimate of revenue differed from Transit's by only $173,000[311] on projected revenues of some $33,000,000. Moreover, Transit's calculations did not take into account significant revenue increases in the second half of 1965,[312] and the Commission projected a smaller increase

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[309] The soundest estimate is one that contains an equal likelihood that the projection will be too large as that it will be too small. If there is no likelihood that a given estimate may be too large but a substantial one that it may be too small, the estimate is unreliable.

[310] *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 67.

[311] Transit's original estimate of total operating revenues for 1966 under existing fares was $32,698,774. *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 52. The Commission's staff projected $253,797 more in regular route revenues and $410,000 more in charter revenues than had Transit. *Id.* at 53. Transit acquiesced in the adjustment for charter revenues, disputing only the increase claimed for regular route operations. *Ibid.* The Commission revised downward the staff's estimate of the latter, reducing the difference between the Commission's estimate of total operating revenues and Transit's to only $173,000. *Ibid.*

[312] At the commencement of the 1965 rate hearing, neither the Commission's staff nor Transit had the full results of Transit's 1965 revenue experience from which to project 1966 revenues. Transit therefore based its revenue estimate for 1966 on revenues earned for the year ending June 30, 1965. However, before the Commission issued Order No. 564, it had before it the complete revenue experience for 1965. Transit's regular route revenue for the year ending June 30, 1965 was $29,837,656, and for the calendar year 1965 was $30,183,559. *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 52-53.

in passenger volume than Transit had assumed.[313] Thus it would seem that the revenue estimates, if at all unreliable, tended to favor Transit.[314]

The Commission's concern over the possibilities of additional costs is equally undocumented. All of the contingencies it identified as potentially enlarging expenses appear to be remote or speculative, and merely variations on the theme that its estimates might be erroneous. For example, even though it made no provision for additional track removal expenditures, the Commission stated that "the possibility exists that Transit might incur considerable expenses over and above the amount which remains in the track removal reserve in 1966. There is also the risk that the track removal program could be accelerated during the future period."[315] Similarly, the Commission said that

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[313] In estimating regular route revenue for 1966, Transit assumed an "average increment of ridership of 2.3% in [the] ensuing year." It applied this figure to revenue and passenger experience for the year ending June 30, 1965, in order to determine anticipated revenue for 1966. See note 312, *supra*. Though the Commission's estimate was based on figures for the year ending December 31, 1965, thus taking into account the increased revenues in the latter half of 1965, see note 312, *supra*, it projected an increase in regular route revenue for 1966, over 1965 levels, of only 1.8%. Thus, had Transit's assumed growth figure of 2.3% been applied to actual revenue experience for the full calendar year 1965, the resulting estimate of regular route revenue for 1966 would have been significantly higher than that estimated by the Commission.

[314] One of the contingencies cited by the Commission in justification of the "cushion" was that "a mere 1% drop in passenger revenues under that projected by the Commission could result in a reduction of approximately $300,000 in collections in 1966." *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 67. But it is also true that a mere 1% growth in revenue would represent an increase of $300,000 and, if anything, the record tends to suggest this latter possibility as the more likely.

[315] *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 67. The record indicates, contrary to this assertion, that estimates of track removal expenses were likely to prove overgenerous. In 1965, track removal expenses were $702,000 less than had been projected. In explaining the delay in completion of planned track removal projects, an official of the Highway Department explained: "The problem in this construction,

there "is a possibility that the company will incur additional labor costs for the last two months of the year,[316] without, however, undertaking to gauge the likelihood that its estimates of future labor expenses might be too low, or to quantify the additional cost of an erroneous projection.

Resort to a "cushion" cannot relieve the Commission of its duty to explore, and make findings on the probabilities of future occurrence of particular expenses. And the line between those costs that can and those that cannot be projected for ratemaking purposes must at all times be scrupulously observed. Expenses too remote or speculative to be forecast with any reasonable degree of certainty, and those that are extraordinary and not likely to recur in normal periods,[317] should be disallowed. The Commission cannot "cushion . . . [the] company in advance against unforeseen events" which do not constitute "ordinary and necessary" expenses.[318]

The Commission, of course, was at liberty to allow a return which would enable not only the payment of an appropriate dividend, but also an addition to surplus of amounts necessary to insure financial stability and to provide to the equity holder a return which in the aggregate is fair and reasonable.[319] The error here is that, instead of making allowance for identified capital needs, and for an

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as in all constructions, you make your schedule and you try very hard to maintain your schedule, but you always have to figure there is going to be some slippage." The Commission, in dealing with the adequacy of the Reserve for Track Removal for 1966, noted the "considerable slippage possibilities in timing the projects." *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 51.

316 *Ibid.*

317 *Michigan Wisconsin Pipeline Co.* v. *FPC*, *supra* note 118, 263 F. 2d at 555.

318 *American Overseas Airlines* v. *CAB*, 103 U.S. App. D.C. 41, 47, 254 F. 2d 744, 750 (1958).

319 See *Transit I*, *supra* note 1, 121 U.S. App. D.C. at 400, 350 F. 2d at 778. See also note 34, *supra*.

overall return "commensurate with returns on investments in other enterprises having corresponding risks,"[320] the Commission viewed the "cushion" simply as a means of offsetting possible errors in its expense predictions.[321] A fair rate of return, properly determined, already includes compensation for the risk that unerystallized contingencies may later reduce actual earnings.[322] But without comparative data, any determination of added risk in isolation is completely arbitrary.[323]

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[320] *FPC* v. *Hope Natural Gas Co.*, *supra* note 38, 320 U.S. at 603.

[321] The result of granting Transit a cushion of $550,000 to $650,000 over and above estimated operating expenses was to give it a return of 7.4% on its rate base and 6.03% of its operating revenue. The operating ratio of 6.03% was even higher than the 5.88% requested by Transit, and substantially higher than Transit's average operating ratio of 4.24% for the years 1959-64. In only one of these years did Transit's operating ratio exceed this amount. The return of 7.4% on rate base is substantially higher than Transit's average return from 1956-65 of 4.93% and higher than in all but one of those ten years. See also note 311, *supra*.

[322] See *FPC* v. *Natural Gas Pipeline Co.*, *supra* note 3, 315 U.S. at 597-98; *Driscoll* v. *Edison Light & Power Co.*, 307 U.S. 104, 120 (1939); *Pennsylvania Water & Power Co.* v. *FPC*, 89 U.S. App. D.C. 235, 247-48, 193 F. 2d 230, 242 (1951), *aff'd* 343 U.S. 414 (1952); *Washington Gas Light Co.* v. *Baker*, *supra* note 94, 88 U.S. App. D.C. at 123-24, 188 F. 2d at 19-20; *City of Pittsburgh* v. *Pennsylvania Public Utils. Comm'n*, 178 Pa. Super. 46, 112 A. 2d 826, 837 (1955).

[323] The Commission advanced no basis whatsoever for its choice of the figure "$550,000 to $650,000," other than the fact that that amount approximated the sum remaining in the court ordered reserve, see *In re D.C. Transit Sys., Inc.* (Order No. 564), *supra* note 12, 63 P.U.R. 3d at 68-69.